

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009070998

DECISION

This matter came before Administrative Law Judge (ALJ) Marian H. Tully, Office of Administrative Hearings, State of California (OAH), on remand from the United States District Court, Southern District of California (District Court), Case No. 10CV0897.

David Grey, Esq., represented Student and her parents (Student).

Brian R. Sciacca, Esq., represented the Poway Unified School District (District).

Student filed her due process hearing request on July 29, 2009. ALJ Robert F. Helfand, heard this matter in San Diego, California, on December 8, 9, 15 and 16, 2009. The matter was submitted on January 11, 2010. The ALJ issued his decision on January 29, 2010. District sought review of the ALJ's decision in District Court. On September 26, 2011, the District Court, in Case No. 10CV0897, the Honorable Larry Alan Burns presiding, issued an order vacating the ALJ's decision and remanding the matter for further proceedings consistent with the District Court's decision.¹ On April 4, 2012, pursuant to the parties' stipulation, the matter was submitted on the record.

¹ The District Court expected, and it would ordinarily be the case, the decision on remand would be assigned to the ALJ who presided at the hearing. However, at the time the case was remanded, the ALJ who heard the matter was not available. Therefore,

ISSUE

Did the District deny Student a free appropriate public education (FAPE) by failing to provide for communication access real-time translation (CART) classroom transcription in the May 18, 2009 individualized education program (IEP)?

FACTUAL FINDINGS

1. Student, at the time of the due process hearing, was a 15-year-old girl living within the jurisdiction of the District and attending ninth grade at Del Norte High School. Student has profound hearing loss in both ears. She is eligible for special education under the eligibility category of hearing impairment as her profound hearing loss results in auditory and language and speech delays adversely affecting communication and academic progress. She has attended general education classes along with her typically-developing peers throughout her education.

2. Student's hearing loss occurred at the age of five months as a result of meningitis. Without amplification, Student can only hear loud noises such as a siren or jet noise. Student received a cochlear implant in her right ear at 22 months. She wore a hearing aide in the left ear until receiving a second cochlear implant around the end of April 2009. Even with her cochlear implants, Student cannot hear everything spoken. With her cochlear implants, Student's audiogram, at age 15, evidenced borderline normal to mild residual hearing loss. (R.T. 12/08/2009 p. 104.)

following notice to the parties, a different ALJ was assigned to review the record and comply with the District Court's order. On remand, the ALJ had the benefit of a written transcript of the hearing. OAH decision format does not normally include record citations. However, in this instance, due to the change of ALJ, to the extent this decision contains additional or different factual findings, record citations are provided.

3. A hearing aid is a sophisticated sound amplification system. With digital technology, the device can be adjusted to amplify certain types of sound and not others.

4. A cochlear implant is an electronic device, part of which is surgically implanted in the head of the deaf individual. Sound is picked up by an external processor, converted to energy and sent into the implanted computer chip. Based on the energy received, the device stimulates the nerves in the inner ear, which then transmit information to the brain. Unlike a hearing aid, the cochlear implant stimulates the ear itself; it does not merely make the sounds louder.

5. Student requires accommodations such as preferential seating and an FM amplification system to access the general education curriculum. Preferential seating is required to make it easier for Student to hear over background noise and because Student supplements her hearing with lip reading to understand most of what is said. An FM system uses radio frequencies to transmit audio signals directly to hearing aides and cochlear implants. It consists of a wireless microphone the speaker wears close to his mouth and the desired acoustic signal is transmitted directly into the hearing device.

6. Student underwent audiograms on March 23, 2009, and July 30, 2009. An audiogram is a graphic reading of hearing ability. Alyson Mellish, a licensed audiologist, who conducted the July 30, 2009 audiogram, and who has treated Student for four years, interpreted the results. Conversational speech was in the 40 to 60 decibel (dB) range. The March 23, 2009 audiogram, which was done before Student received her second cochlear implant, demonstrated Student heard only 24 percent of words spoken with background noise at 47 dB with her right ear and 38 percent of words spoken using both ears. On July 30, 2009, after receiving the second cochlear implant, Student heard 52 percent of words spoken in noise at 45 dB with both ears. Ms. Mellish concluded

Student hears approximately 52 percent of what is said in real-life situations.² Ms. Mellish could not compare this result to what she would expect from a person with normal hearing because people with normal hearing are not evaluated. (R.T. 12/08/2009 p. 109.)

7. Student attended Oak Valley Middle School for the sixth (2006-07), seventh (2007-08) and eighth (2008-09) grades and did well academically.

8. An annual IEP team meeting was held for Student on November 3, 2006. At this meeting, the team discussed trouble that Student, then a sixth grader, had understanding information from media materials because of background noise. At an IEP team meeting on April 5, 2007, Mother requested the District provide transcription services for Student because Student sometimes struggled to keep up with what was going on in class and would at times miss information about assignments, projects, and tests. The Deaf and Hard of Hearing (DHH) teacher, Nancy Simpson, was exploring options for transcription services.

9. At the annual IEP team meeting on October 30, 2007, Mother again requested transcription services for Student because Mother was concerned academics would grow increasingly more difficult as teachers used more lecturing and classroom discussions. Ms. Simpson, the itinerant DHH teacher, was present at the meeting, and informed Parents the District was in the process of acquiring that accommodation although there was no timeline as to when it might be available.

10. On October 21, 2008, the IEP team conducted an annual meeting. In attendance were Student; Mother; Susan Houle, administrator; Holly Mehaffie, special

² This is consistent with Mother's testimony that, on audition alone, Student hears about 60 percent to 70 percent of the information in class. (R.T. 12/15/2009 pp. 198-199.)

education resource specialist; Ms. Simpson; and Student's two general education teachers, Susan Lage, science and algebra, and Jeannine Ugalde, language arts and social studies. The team reviewed Student's grades at the time: B+ in Algebra, B+ in Science, B in Language Arts, and C in Social Studies. Student was missing information during Ms. Ugalde's and Ms. Lage's classes. Both offered to meet with Student outside of class to go over notes and check for understanding as to what occurred in class. The teachers also reported the FM system appeared to assist Student in the classroom setting. The team determined Student met all goals from her previous IEP, and she exceeded grade level standards in writing. The IEP team set two goals for Student. The first goal was to continue to use an FM auditory system. The second was to use written or oral form to "demonstrate that she comprehends new vocabulary and/or concepts being presented in the 8th (9th) grade curriculum with 85% accuracy as measured by teacher records and progress reports." Mother was concerned about Student's upcoming transition to high school and asked for another meeting to deal with the transition. Mother also asked District to provide classroom transcription service. DHH teacher Ms. Simpson acknowledged Student would require transcription services in high school. Ms. Simpson again told Mother the District was in the process of acquiring such a system.

11. Student continued to do well during the eighth grade and received trimester grades for Social Studies of B-, B, and B; Language Arts of B, A-, and B+; Physical Education of A+, A-, and A+; Physical Science of B, B, and B; and Algebra³ of A-, A-, and A-. Student scored in the "proficient" range in English Language Arts and Algebra I on the STAR testing in spring 2008. STAR stands for "standardized testing and

³ Student was repeating Algebra I for the second year.

reporting” and is used by the California Department of Education to assess mastery of state content standards.

TYPES OF TRANSCRIPTION SERVICES

12. There are two basic systems used to transcribe speech to text to assist DHH pupils. The first is “word-for-word” which produces a verbatim transcription showing each word spoken in the classroom. The second is “meaning-for-meaning” which produces a transcript that condenses the words spoken while maintaining the meaning intended by the speaker.

13. The “word-for-word” system, CART, involves a stenographer who uses a stenographic (or court reporting machine) to create a verbatim transcript on a laptop viewed by the pupil. The transcript appears almost simultaneously as the words are spoken. Sandy Eisenberg owns Total Real Time, a company providing CART services for closed captioning⁴ and school districts. Ms. Eisenberg explained that CART operators are graduates of court reporting schools and must type at least 200 words per minute on a stenography machine and differentiate between four voices. The normal rate for a speaker is 160 words per minute. According to Ms. Eisenberg, CART has an accuracy rate of “at least 98 percent.” If an operator’s accuracy rate is at 95 percent, Ms. Eisenberg would find that insufficient. Pupils receive a disk with the transcript of the class daily.

14. TypeWell is one of two “meaning-for-meaning” systems.⁵ The operator uses a laptop attached to a screen for the student to view. TypeWell uses a shorthand system with software that translates the shorthand into complete words on the viewer’s

⁴ Closed captioning displays a transcription of the audio portion of a television or video program as it occurs.

⁵ The other system is C-Print which is similar to TypeWell.

screen. The operator types the consonants of a word. For example, the operator would type "CND" which the software converts to "Canada" on the viewer's screen. If the word produced is incorrect, the operator hits the comma key and another word with the same consonants will appear. There can be a second or more delay between the typing and when the word selected appears on the screen. If the operator must correct a word, the transcript stops until the correction is made. The transcript produced condenses what is said. Thus, a simple sentence would appear on the user's screen in lieu of several sentences spoken. Christa Lyon-Moon is a District TypeWell operator. In 2005, Ms. Moon received TypeWell certification by taking the TypeWell training course. The course consists of two months of home training with a two-day class at the TypeWell company offices. Ms. Moon also transcribes for students at San Diego State University, the University of San Diego, and the San Diego Community College District. Ms. Moon estimates she captures between 70 and 80 percent of what is said in class. She does not transcribe when a speaker reads from a book because she is unable to transcribe the reader word-for-word. Instead, she types out the name and pages of the material read. After class, she prepares a transcript which often includes bold or italic type for important information, such as assignments. The transcript is emailed to the student within a couple of hours. (R.T. 12/15/2009 p. 36.)

DISTRICT CONSIDERATION OF TRANSCRIPTION SERVICES

15. During the 2008-2009 school year, DHH itinerant teachers reported to Theresa Kurtz, the District special education co-director, that parents of some DHH students were requesting the District provide transcription services at the high school level. In February 2009, Ms. Kurtz, Melanie Black, co-director of special education, and her DHH staff met with Chris Roberts of San Diego Unified School District (SDUSD) to observe the transcription service in use by SDUSD. SDUSD utilized a "meaning-for-meaning" service. The District researched the systems and consulted with Roberts. Ms.

Kurtz, Ms. Black, and two DHH teachers, Gwen Suennen and Ms. Simpson, met with the parents of three students with cochlear implants. Parents of all three students were interested in obtaining transcription service for their students during the following year. (R.T. 12/08/2009 pp. 35-38; 44-45; 12/15/2009 pp. 189-190.) Student's Parents attended the meeting. Student's Parents wanted word for word transcription, specifically CART, and brought a packet of information about CART to the meeting. (R.T. 12/08/2009 pp. 35-38; 44-45.) The District researched the information contained in the packet. (R.T. 12/08/2009 pp. 39-44.)

16. Around May 4, 2009, Mother, other parents, Ms. Simpson and other District staff attended a demonstration of a "meaning-for-meaning" system at a SDUSD high school. The demonstration was in a social studies class. Mother sat two feet from the screen. (R.T. 12/15/2009 p. 180.) She noticed the transcript lagged behind the lecturer and portions of the lecture were not captured. The transcript was in summary form; and although it captured the gist of what was said, it was not complete.

STUDENT'S EIGHTH GRADE PROGRESS

17. During the 2008-2009 school year, Ms. Ugalde was Student's teacher in Language Arts and Social Studies. Ms. Ugalde has been teaching for 24 years and has been with the District since 2000. Ms. Ugalde found Student to be intelligent, hardworking, persistent in a positive way, kind, conscientious, and a very good advocate for herself. (R.T. 12/08/2009 p. 125, 138.) Student's grades decreased as the school year progressed. Ms. Ugalde attributed this drop to Student's lack of specialized vocabulary, which negatively impacted her learning. Ms. Ugalde noticed Student's summary of what was discussed in class was often "very off" from what was said. According to Ms. Ugalde, Student missed something in her understanding but Ms. Ugalde did not know whether what Student missed was due to her hearing or her "learning." (R.T. 12/08/2009 p. 128.) Ms. Ugalde graded Student differently than her other students. She took into account

Student's hearing difficulties. As a result Student received higher grades than she actually earned. As the year progressed, Student's writing became more organized, she had better insight into literature and understood more concepts in social studies. (R.T. 12/08/2009 p. 139.) When Student left eighth grade, Student was ready for high school in the subjects Ms. Ugalde taught. (R.T. 12/08/2009 p. 139.)

18. Ms. Lage was Student's eighth grade teacher for Algebra I and Physical Science. Ms. Lage has been a teacher since 2000. Ms. Lage described Student as an excellent student, a dedicated pupil who takes school seriously. (R.T. 12/15/2009 p. 73.) Student helped Ms. Lage as a "TA" grading papers, filing, and helping Ms. Lage with "busy work." (R.T. 12/15/2009 pp. 62-63.) Student was an "A" student in Algebra and a "B" student in Science. Student would often ask questions to clarify what was discussed in class. Ms. Lage did not modify Student's grades to account for her disability. (R.T. 12/15/2009 p. 74.) The only accommodations Ms. Lage provided were the FM system and preferential seating. (R.T. 12/15/2009 p. 76.) Ms. Lage felt, even without transcription in class, Student would do either "A" or "B" work in high school math and "B" work in Biology. Ms. Lage met with Student before the May 18, 2009 IEP meeting to discuss transcription services. Ms. Lage did not know anything about transcription systems, had never seen one used or read an actual transcript. (R.T. 12/15/2009 p. 67, 77-78.) Student told Ms. Lage she preferred the CART system because it was "word-for-word" and accurately reproduced what occurred in the classroom.

19. Ms. Mehaffie, the resource specialist at Oak Valley Middle School, taught Student in seventh and eighth grade. (R.T. 12/16/2009 p. 39.) She observed Student follow along in whole group instruction and small peer group work. (R.T. 12/16/2009 p. 52.) She was very popular with her peers and got along well with her teachers. (R.T. 12/16/2009 p. 52-53.)

MAY 18, 2009 IEP TEAM MEETING

20. An IEP team meeting was scheduled for May 18, 2009. Before the meeting, Mother researched various transcription services and wrote a detailed three-page report entitled "CART-Real Time Captioning for [Student]" (Parent Report). She forwarded copies to Student's teachers and other members of the IEP team before the scheduled meeting. In the report, Mother laid out the results of her research and her observations of the demonstration at SDUSD. Mother opined Student needed a "verbatim caption that she can refer to and fill in as needed when audition alone is not sufficient" because (1) CART would enable Student to have access to the same information as her peers; (2) Student could determine what was important in class discussions and not rely on a note-taker's interpretation; (3) Real-time captions would permit Student to understand immediately if she missed something during class; and (4) CART would help Student build vocabulary.

21. The IEP team met on May 18, 2009, to plan Student's transition from middle school to high school. Parents attended as did program specialists Jodie Payne and Geralyn Murray, DHH itinerant teachers Carol Reeves and Ms. Simpson, Ms. Suennen, Ms. Mehaffie, Ms. Ugalde, and Kelly Burke, an assistant principal at Del Norte High School. The team discussed Student's eighth grade progress. Student continued to excel in science and math. She maintained a "B" average in both subjects. Student's grades in language arts and social studies had decreased. Student's vocabulary was an area of concern. The team proposed to address some of Student's vocabulary issues in Student's Learning Strategies class. (Exh. S-5.) The team noted Student had received her second cochlear implant approximately two weeks before the meeting and it might take up to a year for Student's hearing to "get up to par." (Exh. S-5.) Parents asked District to provide CART transcription service so Student would have access to a verbatim simultaneous transcript of class discussions. Parents read the Parent Report aloud,

shared their preference for CART, and their conclusion that a "meaning-for-meaning" service would not be "worth the money." (Exhs. S-5, S-6, S-15.) When Mother testified at hearing, she acknowledged that Student "may get some benefit" from TypeWell. Parents were advised at the meeting that "a specific methodology cannot be determined by the IEP team" and a specific transcription program had not yet been purchased by the District. (Exhs. S-5, S-6.)

22. The May 18, 2009 IEP specified services, modifications and accommodations for high school including: DHH Language and Speech, Resource Specialist Program (RSP) Learning Strategies class, preferential seating, a second set of text books for the home, copies of teacher's notes when necessary, closed captioning for media, peer note taker in Health class, personal auditory FM system, laptop for streaming closed captioned videos, closed caption decoder, visual presentation of new materials and vocabulary, and directions to teachers to face Student when speaking. (R.T. 12/16/2009 pp. 46-47; Exh. D-5.) The IEP team determined transcription would be provided in classes with a lot of lecturing, English, Geometry and Biology. Parents refused to consent to the IEP. Parents requested that the type of transcription service be designated in the IEP. The program specialist offered to share Parents' concerns with the special education director.

JUNE 9, 2009 IEP TEAM MEETING

23. On May 20, 2009, Mother emailed Ms. Ugalde and Ms. Lage. She asked for their input as to which transcription service they believed would be most appropriate to meet Student's needs.

24. On May 22, 2009, Ms. Lage replied by email stating, "I agree that CART would be most beneficial." She also noted "[n]ote taking is a learned skill and CART will allow for her to develop that skill." When she wrote "CART would be most beneficial" she did not mean another service would not be appropriate. (R.T. 12/15/2009 pp. 77-78.)

25. Ms. Ugalde also responded to Mother by email on May 22, 2009. Ms. Ugalde noted Student had missed out on so much language and vocabulary she needed to catch up to the level of her peers. To ensure Student catch up, Ms. Ugalde hoped "she'll (Student) be provided the opportunity to somehow 'get' every single word that's being said during instruction including student comments." Ms. Ugalde concluded: "Now, in order to access the text and content of high school, she's going to need the opportunity to start 'hearing' all of the language that she's been missing." Ms. Ugalde did not intend to express a preference for one transcription service over another in her email. (R.T. 12/08/2009 p. 141.)

26. On June 9, 2009, the IEP team reconvened at Parents' request to discuss which type of transcription system would be provided to Student for her ninth grade year. Parents, Ms. Lage, Ms. Simpson, and Ms. Mehaffie attended. Parents maintained Student required CART to meet her needs. Ms. Simpson informed Parents the District had communicated with other school districts. Ms. Simpson described a student from one district who switched from CART to a "meaning-for-meaning" system because he was overwhelmed by the amount of information presented in the verbatim format. Ms. Simpson concluded a "meaning-for-meaning" system was appropriate for Student because CART can be distracting and it includes transcription of student participation in the transcript. Ms. Mehaffie was not familiar with TypeWell and, until the May 18, 2009 IEP meeting, had not known what CART was. Ms. Simpson added Student would benefit from transcription services. Parents refused to consent to the IEP.

STUDENT'S PERFORMANCE DURING FALL 2009

27. Student's triennial IEP meeting took place on October 23, 2009. (Exh. D-13.) In September 2009, in preparation for the meeting, Ms. Suennen conducted a Speech and Language Assessment. (R.T. 12/09/2012 pp. 81-82.) Student's test results showed Student's classroom understanding of vocabulary was within the average range

of hearing students her age. (R.T. 12/09/2012 p. 83.) Student's ability to express her vocabulary was below average. (R.T. 12/09/2012 pp. 83-84.) At the meeting on October 23, 2009, the IEP team determined Student's annual goals set in October 2008, had been met. New goals were established to address verbal articulation, hearing with the second cochlear implant, explanation of metaphors and proverbs, interpretive response to literature, define 100 core literature vocabulary words and continued use of FM amplification. Parents attended the meeting but did not sign the IEP. (Exh. D-13.)

28. Student was an "A" student in all subjects during the first trimester of fall 2009. Student had preferential seating, teachers used an FM system in order to accommodate her disability, and faced her when speaking. All of her teachers reported Student was an excellent student, well prepared and an active questioner in class. Student excelled in Mandarin, the quality of Student's work was "superb" and consistent. (R.T. 12/16/2009 p. 12.) She was positive, motivated and, when she mastered the content, she helped other students. (R.T. 12/16/2009 p. 14.) Student was in the top two, if not, then the top five percent in the class of 31. (R.T. 12/16/2009 p. 15.) In math, Student was enrolled in Geometry I, followed by Geometry II, in a class of 37 students. She tried to help other students and her teacher when she finished her own work. (R.T. 12/16/2009 p. at 32.) Student was an outstanding participant in her English class, she often took a leadership position in group activities. (R.T. 12/16/2009 p. 58-59.) She was in the top five percent of her English class. (R.T. 12/16/2009 p. 61.) In Health class, Student "does the best of just about any student." (R.T. 12/16/2009 p. 76.)

29. Student routinely and actively asked questions to clarify what was said or discussed in class and to clarify assignments. Student's teachers assisted her by repeating questions asked by class members or by paraphrasing what was said by Student's peers. Student often approached her Mandarin teacher after class to clarify homework assignments. Student constantly asked her Geometry teacher questions to

clarify what was said in class. Class discussion was an important element of Student's English class and Student often repeated or paraphrased what others in the classroom to ensure she has understood the discussion. Student often missed things said in her Biology class by both the teacher and fellow students. As a result, Student asked lots of questions to clarify what was discussed during class. According to all of these teachers, Student did not need any accommodations, other than those being provided, to access the curriculum. (R.T. 12/16/2009 pp. 15, 32, 61-62, 78.)

30. TypeWell was used by another DHH student in Student's Biology class. Student's Biology teacher reviewed a TypeWell transcript from her class. The transcript captured 95%-100% of the content covered in class and included all vocabulary words. (R.T 12/16/2009 pp. 87-88, 92.)

STUDENT'S TESTIMONY

31. Student testified at the due process hearing. She was a pleasant and articulate 15 year old. Because of her hearing deficiency, she relies on her limited hearing and lip-reading to understand what occurs during class. Thus, Student must face the speaker to comprehend the gist of what is being said. Student must concentrate intensely to comprehend what is said in class which causes her frequent headaches. Frequently, she misses what is said in class. She also is often unable to hear when her peers participate in class discussions and misses or misunderstands instructions and assignments. Student estimates she must take much more time to do assignments and study than an average student in her classes to ensure she understands what is discussed in class. She estimates she takes three hours or more to complete an assignment that would take an average student one hour. Parents often assist her in this task. Because of the nature of her classes, it is important for Student to understand what is being said by her fellow students during class participation for her to learn the

material. Student constantly asks questions during class and meets with teachers outside of class to clarify what was discussed in class.

32. Student was familiar with word for word transcription. Student attended a demonstration of CART at a Miramar College philosophy class. Student was able to follow what the lecturer was saying because she used the screen to pick up words she did not comprehend from her listening and lip-reading. She attended a TypeWell demonstration at Stanley Middle School and has used TypeWell during her Biology class on approximately three occasions. Student found TypeWell transcription confusing because (1) the operator was unable to keep up with what was being said and (2) not every word appeared on the screen. Student often looked at the screen to see words she did not understand; and since the words were not always present, she became confused and lost her concentration. Student also liked CART because she, instead of the TypeWell operator, could decide what was important.

STUDENT'S EXPERT

33. Student's expert, Jacqueline Solorzano, has been an auditory verbal therapist since 2005. Auditory verbal therapy is designed to teach a hearing impaired child to use hearing provided by a hearing aid or cochlear implant for understanding speech and learning to talk. She received a B.S. in child development from California State University, Fullerton in 1999, and a M.S. in education from the University of Southern California in 2000. She was an oral teacher to DHH students from 2000 to 2003, and a preschool special education teacher from 2003 to 2006. Ms. Solorzano has two adult children with severe hearing loss who have cochlear implants. She became familiar with CART five years ago when she researched whether it would be appropriate for her children. Both of her children use CART. People with cochlear implants have problems with background noise because all noises are equally amplified by the implant. This distracts the listener and inhibits the listener's ability to attend to the

speaker. Persons with cochlear implants often do not hear an entire word but only a portion of the word. Because a CART transcript is almost simultaneous, a person using CART can glance down at the screen to see a word which the listener has not completely heard or is unsure about, or to catch up to what is being said by a peer in the classroom.

34. Ms. Solorzano observed Student in her ninth grade Biology class approximately one week prior to the commencement of the due process hearing. She spent under an hour in the class and observed TypeWell in use for about 10-15 minutes. (R.T. 12/09/2009 pp. 40-41.) Ms. Solorzano had never observed TypeWell in any other setting. (R.T. 12/09/2009 pp. 40-41.) The purpose of her classroom visit was to observe Student, not to observe whether TypeWell was effective. (R.T. 12/09/2009 pp. 44-45, 49-50.) The class had a lot of background noise and the teacher kept the classroom door open which permitted additional noise. TypeWell was being used by another pupil. Ms. Solorzano observed the TypeWell typist failed to capture student questions and discussions during class. She also observed the transcript often stopped while the typist made corrections. Ms. Solorzano opined CART would assist Student in her goal to learn and understand new vocabulary and concepts because CART allows the listener to almost simultaneously see a word, hear it and connect it to the context. Ms. Solorzano further opined CART would allow Student to feel a part of the class because she could keep up with and understand what is being discussed, including comments by other students in the class as well as the teacher. Thirdly, CART assists a DHH student in learning the skill of note-taking because it permits the student to follow along in real time. Based upon these factors, Ms. Solorzano concluded CART was appropriate for Student to meet her unique needs.

DISTRICT'S EXPERT

35. Sheila Doctors was a consultant and expert witness on behalf of school districts in matters involving communication methodology and cochlear implants,

including interpreting services for students with hearing loss. She received a B.A. in English with a special education minor in 1967 from Brooklyn College. In 1978, she received a M.A. in education of the hearing impaired from Gallaudet University. Ms. Doctors was an English teacher from 1967 to 1971 in Buffalo, New York, and a DHH teacher from 1978 through 1982 with the Montgomery County, Maryland, public schools. Since 2005, she has been a private consultant. She is familiar with CART, TypeWell and C-Print. (12/16/2009 p. 118.) CART produces a verbatim word for word transcription in real time. (12/16/2009 p. 118.) The label "meaning-for-meaning" is ambiguous, and has been misunderstood. (12/16/2009 p. 119-120.) TypeWell and C-Print are very similar to CART but without the false starts, corrections, "ums," "errs," repetitions and redundancies that typically occur in spoken language. (12/16/2009 p. 119-120.) The process does not produce less content, it is "almost like the difference between when we write and when we speak." (12/16/2009 p. 119-120.) Ms. Doctors has observed TypeWell transcription more than 20 but less than 50 times. (12/16/2009 p. 119-120.)

36. Ms. Doctors explained the goal in providing transcription services is to provide the DHH pupil with access to information equal to that of hearing students. In order to determine which transcription service is most appropriate for a student, it is essential to look to the student's IEP goals and determine the level of support the student requires. Ms. Doctors noted grades are not an important variable in deciding which transcription service is appropriate. Other variables to consider are the density of communication in specific classes, the student's reading level, and the nature of the situation. Additionally, it is important to get input from the student. CART is an appropriate system for use in classes with a high density of language. CART is more appropriate than the "meaning-for-meaning" systems in classes that are more language-dense, especially where lecturing is the main method of teaching. The best

example of a high school class where CART might be appropriate would be an AP history class where a teacher might lecture “bell to bell.” (12/16/2009 p. 133-134.) Another example was the case of a student who did well in high school with meaning-for-meaning transcription who needed CART in law school. (12/16/2009 p. 133-134.) The most important variable is the nature of the class and the verbal density of the instruction. (12/16/2009 p. 135-136.) The instructional environment in most public high schools is not lecture, but “pair share” including partnering, group work, and games. (12/16/2009 p. 143.)

37. Ms. Doctors reviewed Student’s IEPs and the Speech and Language Assessment from September 2009. She observed Student in three classes on November 19, 2009, and one class on December 1, 2009. On November 19, 2009, Ms. Doctors observed Student in Mandarin, Health, and Biology. The Mandarin class was very active with little lecture. Ms. Doctors felt Student did not need any transcription in Mandarin because Student fully participated in class and the teacher did little lecturing. Ms. Doctors also felt Student did not require transcription in Health because, even though the class was in a lecture format, the material was “easy.” Ms. Doctors concluded the verbal load of the material in Biology required transcription. Ms. Doctors observed TypeWell in use for another student during the entire Biology period. (R.T. 12/16/2009 p. 130.) The TypeWell transcript was excellent, with no gaps. (R.T. 12/16/2009 p. 130.) On December 1, 2009, Ms. Doctors observed Student in her Geometry class. Here, the teacher gave direct instruction accompanied by peer input. Ms. Doctors felt Student required transcription in Geometry so Student could hear essential student input. Of the 205 minutes Ms. Doctors spent in Student’s classes, 56 percent of the time involved activities that do not require transcription such as silent reading, working with peers, matching, etc. (R.T. 12/16/2009 p. 143.) Ms. Doctors concluded Student needed

transcription in Biology, English and Geometry, but not Mandarin or Health. Ms. Doctors opined that Student did not need CART, and that TypeWell would be “fine.”

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party requesting relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

CONTENTIONS OF THE PARTIES

2. Student contends, in her brief on remand, the issue is whether the District’s offer of TypeWell, and other accommodations in the May 18, 2009 IEP, was reasonably calculated to enable Student to receive some educational benefit. Student argues that nothing short of word for word transcription provided by CART in addition to the supports contained in the IEP will satisfy the FAPE standard of “some educational benefit.” District contends the services included in Student’s May 18, 2009 IEP, including TypeWell transcription, were reasonably calculated to provide Student with some educational benefit. For the reasons set forth below, Student failed to prove, by a preponderance of the evidence, that District’s failure to provide CART transcription denied Student a FAPE.

APPLICABLE LAW

3. Under the Individuals with Disabilities in Education Act (IDEA), and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards and conform to the child’s IEP. (20 U.S.C. § 1401(9).) “Special education” is instruction specially designed to meet the unique needs of a child

with a disability. (20 U.S.C. § 1401(29).) The term “unique educational needs” is to be broadly construed and includes the student’s academic, social, emotional, communicative, physical and vocational needs. (*Seattle School District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.) “Related services” are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) School districts are required to support assistive technology services with “any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs,” they are not required to provide medical equipment. (20 U.S.C. § 1401(1); Ed. Code, §§ 56020.5 & Ed. Code, § 56363.1.)

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), 458 U.S. 176, 201[102 S. Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit” to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at p. 200, 203-204.)

5. The facts at issue in *Rowley* involved a deaf student with some residual hearing who was an excellent lip reader. She attended kindergarten and first grade in a regular classroom. The district provided FM amplification and specialized services from a tutor for the deaf and a speech therapist. District provided a sign language interpreter for a two week experimental period in kindergarten but the interpreter reported that the

student did not need this service at that time. The student progressed easily from grade to grade and performed better than the average student with these services. She was well adjusted, communicated well with her classmates and had “extraordinary rapport with her teachers. Student was achieving educationally, academically and socially without the assistance of the interpreter even though she understood considerably less of what went on in the classroom, and was not learning as much, or performing as well, as she would have been if she was not deaf. (*Rowley, supra*, at p. 185.) Based on the student’s “academic progress, considered with the special services and professional consideration accorded by [her] school administrators” the Court concluded the student’s IEP was reasonably calculated to provide educational benefit. (*Id.* at p. 203.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to provide the program preferred by the parents, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled student to constitute a FAPE under the IDEA, a school district’s offer of educational services must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) The methodology used to implement an IEP is left up to the district’s discretion so long as it meets a student’s needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

7. California law defines “special education” as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the

pupil to benefit from instruction. (Ed. Code, § 56031.) In California, related services are called designated instruction and services (DIS), and must be provided “as may be required to assist an individual with exceptional needs to benefit from special education.” (Ed. Code, § 56363, subd. (a).) Related services include transcription services such as CART, TypeWell and C-Print. (34 C.F.R. §300.34(c)(4).) Assistive technology devices or services may be required as part of the child’s special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.) “Assistive technology device” is defined as “any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs.” (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

8. The IDEA requires that all disabled students receive an individualized education program (IEP). (20 U.S.C. § 1414(d)(2).) An IEP is a written document that is “designed as a package” to target all of a student’s unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) To determine whether a particular IEP has offered a FAPE, the Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of a school district cannot “be judged exclusively by hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

9. In general, when developing an IEP, the IEP team must consider the child’s strengths, the parent’s concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) There are also specific considerations required for DHH students. The IDEA requires the IEP team “consider the communication needs” for deaf or hard of hearing students (DHH)

and to consider “opportunities of direct communication with peers and professional personnel” of a child in developing an IEP. (20 U.S.C. §1414(d)(3)(B)(iv).) Similarly, under California law, when developing an IEP for a DHH student, the IEP team shall “[c]onsider the communication needs of the pupil” including “the pupil’s language and communication mode, academic level, and full range of needs including opportunities for direct instruction in the pupil’s language and communication mode.” (Ed. Code, § 56341.1, subd. (b)(4).) The IEP team must consider whether the student requires assistive technology devices and services. (Ed. Code, § 56341.1, subd. (b)(5).) The IEP team must discuss the communication needs of the student, consistent with “Deaf Students Education Services Policy Guidance” (57 Fed.Reg. 49274 (October 1992)), including the student’s primary language mode which may include spoken language, visual cues or both; access to peers of similar age, cognitive, and language abilities; appropriate, direct, and ongoing language access to special education teachers and other specialists; and services necessary to ensure communication-accessible academic instructions. (Ed. Code, § 56345, subd. (d).) Although there are particularly provisions of the IDEA and Education Code that are applicable to DHH students, California law does not set a higher standard for educating students with exceptional needs than that established in the IDEA. (Ed. Code, § 56000, subd. (e).)

10. Two recent decisions, *D.H. v. Poway Unified School District* (S.D. Cal., Mar. 14, 2011, No. 09cv2621-L(LNS)) 2011 WL 883003 (*Poway*), and *K.M. v. Tustin Unified School District* (C.D. Cal., July 5, 2011, No. SACV 10-1011 DOC (MLGx)) 2011 WL 2733673 (*Tustin*), considered a similar issue to that presented here. The student in *Poway* had a cochlear implant in her right ear and a hearing aid in her left ear. The student in *Tustin* had a cochlear implant in her right ear, a hearing aid in her left ear and had recently received a cochlear implant in her left ear. The students in both of these cases attended a regular school and took general education classes with non-disabled peers. Each

student progressed from grade to grade with passing or better grades. Both students were auditory/oral learners and used speech and listening as their primary mode of communication. Both students were provided assistive technology such as FM amplification and close captioning. Both students had preferential classroom seating, and used lip reading and other strategies to help themselves understand what they did not hear. Parents of each student requested CART classroom transcription because the students sometimes missed what was said in class. An ALJ in each case found the student was not entitled to CART under the IDEA.

The District Court, in *Poway*, affirmed. The Court applied *Rowley* and concluded "Even if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits." (*D.H. v. Poway Unified School District, supra*, 2011 WL 883003 at *5.) Similarly, in *Tustin*, the District Court held "[m]ost critically, under *Rowley*, the fact that CART services would 'maximize' [student's] potential does not mandate the District to provide them so long as the District was providing sufficient accommodations for [student] to offer her a reasonable educational benefit." (*K.M. v. Tustin Unified School District, supra*, 2011 WL 2733673 at *13.)

ANALYSIS

11. Student, like the student at issue in *Rowley*, was progressing satisfactorily educationally, academically, and socially even without any transcription service. She performed better than average hearing students in her classes, achieving A's and B's in eighth grade and, at the time of the hearing, straight A's in ninth grade. (Factual Findings 7, 11, 17, 18, and 28.) Student was well adjusted, interacted well with her classmates and had excellent relationships with her teachers. (Factual Findings 17 through 19, 28, and 29.) She was described by her teachers as popular, a leader,

intelligent, persistent, kind, well prepared, a serious dedicated pupil, a hard worker and a very good self-advocate. (Factual Findings 11, 17 through 19, 28 and 29.) Student managed a rigorous academic class load as she progressed from grade to grade. (Factual Findings 7, 11, 17, 18, 28 and 29.) When Student approached the transition between middle school and high school, Student was ready for the transition and was expected to continue her high level of achievement in the general education curriculum. (Factual Findings 11, 17 and 18; Legal Conclusion 5.)

12. To help prepare Student for this transition, the IEP team met on May 18, 2009, and again on June 9, 2009. The IEP team included two program specialists, two DHH itinerant teachers, an auditory oral therapist, a resource specialist, Student's general education teacher in language arts and social studies, the assistant principal at the high school, and both Parents. The team recognized Student was an auditory learner supported by FM amplification, cochlear implants, lip reading and other visual cues and her primary language mode was spoken language. The team reviewed Student's level of performance in a rigorous general education curriculum, and identified some weakness in vocabulary. The team discussed Student's full range of needs to ensure communication accessible academic instruction and offered a number of services to address these needs. (Factual Findings 20 through 26; Legal Conclusion 9.)

13. The services offered included a combination of special education classes (RSP Learning Strategies), accommodations in the general education environment (preferential seating, teacher placement and focus, visual presentation of new materials and vocabulary), assistive technology (FM amplification, laptop, streaming closed captioning of videos), and practical assistance such as a second set of text books for home use, access to teachers' notes and peer assistance with note taking. The team also concluded that a classroom transcription service would help Student access the curriculum in English, Geometry and Biology. Student's Parents provided the IEP team

with research and a presentation about the reasons for their preference for CART word-for-word transcription. The team considered Parent's preferences. The May 18, 2009, IEP offered Student a FAPE. (Factual Findings 20 through 26; Legal Conclusions 8 through 10.)

14. The District's offer to provide TypeWell, rather than CART, was based on Student's unique needs. Student was a very good auditory learner and supplemented her understanding of classroom instruction with a variety of strategies. She was very successful. Although Student showed some difficulty with vocabulary in eighth grade, it was not clear how much of this difficulty was due to her hearing loss. After her transition to more rigorous academic subjects involving more advanced vocabulary, lecture and class discussion in ninth grade, she continued to improve. In addition, the team was aware that Student had recently received her second cochlear implant and it could take up to a year for her hearing to adjust. The team did not feel transcription was required in all classes. Based on the complexity of the vocabulary in math, science and English, the team felt that transcription would be helpful in those classes. Before District made this offer, District listened to Parent's preferences, read Parent's Report, considered Student's preference, researched CART, observed meaning-for-meaning transcription services in use at another high school, communicated with other districts and conducted three comprehensive IEP team meetings. (Factual Findings 11, 15, 16, 20 through 29, and 31; Legal Conclusions 3 through 5, and 9.)

15. District's expert had extensive experience with word-for-word and meaning-for-meaning transcription services, she was knowledgeable about the high school classroom in which TypeWell functions well, and when the curriculum would make CART appropriate. CART is appropriate in "high density language" advanced subjects dependant upon "bell to bell" classroom lecture. Student's high school classes, as most public high school classes, were not lecture dependant and approximately half

of class room time was devoted to learning activities that would not require any transcription. District's expert opinion was corroborated by Student's eighth and ninth grade teachers. Although Parent's desire to have what they felt was best for Student is understandable, the evidence does not support a finding that TypeWell would not provide some educational benefit within the meaning of *Rowley*. Neither of Student's eighth grade teachers had a preference for either service. Student's performance in eighth and ninth grade math, science and English, without any transcription, was well above the level of her peers. At hearing, when asked whether Student could get any benefit from TypeWell, Mother admitted Student "may get some benefit" from TypeWell. No contrary opinion was offered by Student's expert. Student's expert's testimony was limited to general impressions of Student in her ninth grade biology class. Her only experience with TypeWell was this single 10-15 minute observation when TypeWell was being used for another student. She did not observe the class to see whether TypeWell was effective. Her preference for CART was based upon her own experience with CART when used by her own two children. Accordingly, the testimony of District's expert was more persuasive on whether CART was required for Student to receive a FAPE. (Factual Findings 33 through 37; Legal Conclusions 3 through 5.)

16. In sum, given the information the District had at the time of the offer, District reasonably concluded that TypeWell would provide Student some educational benefit within the meaning of *Rowley*. Given that Student would receive some educational benefit from TypeWell, District was not required to provide Student with the transcription methodology preferred by Parents. Accordingly, Student failed to show that CART transcription was required to provide her a FAPE. (Factual Findings 10, 11, 15 through 26, and 33 through 37; Legal Conclusions 3 through 10.)

ORDER

Student's request for relief is denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section, the following finding is made: District prevailed on the sole issue heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: May 21, 2012



MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings